COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

RE: PETITION OF THE CAPE LIGHT COMPACT FOR APPROVAL OF A MUNICIPAL AGGREGATION DEFAULT SERVICE PILOT PROJECT **DTE 01-63**

REPLY COMMENTS OF THE CAPE LIGHT COMPACT

I. EXECUTIVE SUMMARY

These Reply Comments of the Cape Light Compact ("Compact") are comprised of seven sections.

At pages 3-4, the Compact discusses the background of this proceeding, the purpose of its Municipal Aggregation Default Service Pilot Project (the "Plan" or the "Pilot"), and the history of the proceedings to date. In this section, the Compact also lists all of the comments received.

At page 5, the Compact briefly discusses the supportive comments received from the Massachusetts Division of Energy Resources ("DOER"), the Cape and Vineyard legislative delegation, the two primary legislative framers of the Restructuring Act, St. 1997, c.164, various consumer advocates and individual commenters.

At pages 5-9, the Compact addresses the practical, transition-related concerns raised by the Commonwealth Electric Company (the "Company"). As set forth below, the Compact believes that all of these concerns have been satisfactorily resolved by communications between it and the Company; to the extent there are additional concerns, the Compact reiterates its commitment to working cooperatively with the Company to resolve those issues.

At pages 10-21, the Compact addresses the comments of the Attorney General and others. First, the Compact demonstrates that adjudicatory proceedings are legally unwarranted and would not serve any appropriate person. Second, the Compact responds to various concerns about the contract process it is using, transition costs and the impact of its Plan on other Default Service customers. The Compact commits itself to working with the Attorney General, DOER and the Department to develop an appropriate Consumer Education program in connection with the Plan and explains its market process and why it is appropriate and lawful for the provision of competitive supply as an alternative to Default Service. The Compact also responds at length, pp.16-20, to the arguments that the Department lacks the legal authority to approve the Pilot (a point also made by Duke Energy Trading and Marketing, LLC ("Duke")) and demonstrates that its Pilot is entirely consistent with the Restructuring Act and other pertinent statutes and the common law.

At pages 21-23, the Compact responds to Duke's concerns about the potential impact of the Plan on it and other Default Service suppliers to The Company. The Compact has included reasonable measures to protect other Default Service customers.

At page 23, the Compact responds briefly to the comments of Dominion Retail, Inc. ("Dominion"), which are largely policy-based opposition to opt-out aggregation and a preference for opt-in aggregation. The Compact believes that Dominion has no legal or empirical basis to support its position. As a result, Dominion's comments cannot be credited.

Finally, in its Conclusion at pages 23-24, the Compact suggests how the Department should proceed and reiterates its commitment to filing its power supply contract for review prior to implementation.

II. INTRODUCTION

On August 15, 2001, the Cape Light Compact (the "Compact") submitted a Petition to the Department of Telecommunications and Energy ("DTE" or the "Department") seeking approval of the Plan in order to provide a term-limited program of retail choice and cost reductions for the approximately forty-two thousand Default Service customers on the Cape and Vineyard. The Plan is based on the Compact's Aggregation Plan approved by the Department in DTE 00-47 (August 2000). As a Pilot, it will provide valuable experience for implementation of the Compact's universal service program. It should be noted that while some market options are emerging for medium and large commercial and industrial Default Service customers, small commercial and residential customers have few, if any, opportunities for competitive service.

The filing of the Petition was accompanied by the Plan and the Compact's previously-approved Aggregation Plan. (The Plan was basically designed to be consistent with, and implement a phase of, the overall approved Aggregation Plan.) The Compact, per the directive of the Department, timely served all those named on the service lists in DTE 00-47 and DTE 01-54, as well as local officials in all of its twenty-one member towns and filed a proof of service and publication of the same with the Department. All told, approximately one hundred ninety-two individuals, including representatives of various municipalities and companies, were served with a copy of the filing.

The Department established September 11, 2001 as the date by which initial comments should be filed and September 18, 2001 as the date by which reply comments should be filed. The date for the filing of initial comments was extended until September 12, 2001 due to the

national tragedy that occurred on the 11th. The Compact subsequently asked for, and received, a commensurate extension of the date for filing replies until September 19, 2001; this date was further extended until September 28, 2001 by a motion filed by the Attorney General in order to give interested persons an opportunity to meet and confer about issues related to the Compact's filing and extended again to October 2, 2001 by a Compact motion allowing the discussion process to continue further before the filing of reply comments.

The following persons or companies filed comments: State Representative Daniel Bosley and State Senator Michael Morrissey (joint letter) (8/20/01), State Representative Thomas George (8/27/01), State Representative Matt Patrick (8/28/01), State Senator Robert O'Leary and State Senator Therese Murray (joint letter) (8/29/01), Massachusetts Division of Energy Resources (9/7/01), Consumer Assistance Council (9/7/01), Low-Income Energy Affordability Network (by Jerrold Oppenheim)(9/10/01), IRATE, Inc. (9/10/01), Dominion Retail, Inc. (9/10/01), Joseph N. Zdanovich (9/11/01), Commonwealth Electric Company (9/12/01), Duke Energy Trading and Marketing, LLC (9/12/01) and the Office of the Attorney General (9/12/01).

The Compact hereby files its Reply Comments. For ease of reference, comments are generally organized in response to one or more of the initial commenters and in the order of points made by those commenters.

III. SPECIFIC REPLY COMMENTS

A. Division of Energy Resources, Representative George, Representative Patrick, Senator O'Leary, Senator Murray, Representative Bosley, Senator Morrissey, Consumer Assistance Council, Low-Income Energy Affordability Network and Joseph N. Zdanovich

The Compact deeply appreciates the support of these commenters. The Compact would not have proceeded with this filing without the clear endorsement of DOER, the agency statutorily charged with establishing a pilot program along with the Department. St. 1997, c. 164, §339. The Compact is also gratified by the strong support of the Plan from the entire Cape and Islands legislative delegation and from Representative Bosley and Senator Morrissey, the two primary legislative framers of the restructuring act, St. 1997, c. 164. It also acknowledges the support of the various consumer advocates and individual commenters, which support further demonstrates the need for and benefit of the Plan through which the Compact proposes to bring competitive supply to customers paying the highest amounts for generation service and who, especially in the case of residents and small-businesses, lack alternative choices.

B. Commonwealth Electric Company

The Company expressed its support for the Pilot and raised several concerns in its initial comments that largely involve the operation and transition to the Compact's proposed program to begin the benefits of competitive supply to Default Service customers. Since the initial comments were filed, representatives of the Compact have met with the Company to understand and respond orally to these questions. The Compact's responses set forth herein are meant to confirm the Compact's oral clarifications or agreements which it believes satisfactorily address

the Company's concerns. To the extent that other operational issues of concern to the Company are later identified, the Compact believes that such concerns can be swiftly resolved through a continuation of good communication and cooperation between it and the Company. The Compact reiterates its commitment to such a process.

The Company's first point is that it does not believe that the Compact should commence the Pilot without DTE review and approval of a power supply contract. The Compact emphasizes that its petition contemplated such a process and that it is willing to file a contract with the Department for review and approval and to afford all interested persons an opportunity to comment. However, because of the ongoing evolution of the market and price volatility, the Compact suggests that the review process should be as expeditious as possible. The Compact proposes that the Department adopt a five full business day review period. If during that time the Department determines an investigation into the proposed contract is warranted, the review period would be extended, with a recognition that any delay can result in costs to a supplier and possibly trigger a supplier termination of the proposed contract since the options securing it will likely be based on a very short timeline for all approvals to be received.

While the Compact has commenced a market effort, the fact of the matter is that no supplier will lock in prices five months in advance for a program that has not yet received approval. The Compact is implementing its market effort in parallel with the effort to have the Plan approved, and will provide the resulting contract to the DTE following approval of the Plan and the supplier lock-in on price. Governing Board members of the Compact who represent their communities will not approve a contract unless there is a demonstrated savings and consumer and other protections; the Compact will not enter into a contract that allows the

supplier to exceed Default Service prices. It should also be added that the Compact has an experienced technical team and members of the Board who spent their careers in the electric utility industry and thus is backed by those who possess a firm understanding of the marketplace. (These qualifications were described in detail in the Compact's Aggregation Plan filing in DTE 00-47.)

In general, the relationships in the Compact's Pilot are designed to coincide with the competitive market. The Compact acts as agent for the aggregated customer group and individuals may choose not to participate (opt-out). The supplier is providing competitive supply to the participating customers in this group under terms negotiated with the Compact and contained in the contract which the DTE will review and approve. These terms will be summarized in the written notice to be provided to customers notifying them of their right to opt-out and the entire contract will be made publicly available through a variety of means. NSTAR is providing metering, billing and other services consistent with a competitive supply market, as well as service in the process for customer enrollment described below.

The Company also asks for clarification in terms of the Compact's enrollment mechanics. The enrollment process follows the procedure outlined in the Compact's approved Aggregation Plan for electronic transfer of data between the Company, the Compact and the supplier. The Company has stated that it is prepared to transfer all existing customers receiving Default Service through this process. The Compact understands and agrees that if the Plan is not approved by October 27, 2001, the Company may need additional time to begin switching customers to the Compact's supplier. The Compact does not expect that new Default Service customers (*i.e.*, customers added after the date of the initial customer list to be switched to the

Compact supplier) will be switched on the same start date. The Compact believes that it and the Company can develop an appropriate protocol to switch these "new" Default Service customers on an "automatic basis." The Company has offered a method to transfer these "new" customers and has stated it will not seek recovery from the Compact or customers for the incremental cost of making the system changes necessary to develop that protocol, provided that the Compact Plan is implemented as proposed. The Compact will work with the Company to assure that there are no added costs as a result of this process.

The Company asks for clarifications about service start-up under the Plan. The Compact concurs with the Company that it does not expect all customers to be switched on January 1, 2002, but that it will be done in phases as customers end their normal billing cycle following the approved start date for the Compact Plan.

The Company also addresses issues pertaining to customer education. The Compact agrees that a thorough program for customer education is essential to the Pilot and has developed an Education Plan. The purpose of the Education Plan is to provide consumers with public information and direct mail information concerning the opportunities, options and rights for participation in the Pilot. It consists of two parts: 1) general education conducted through the media, written communications, and presentations to inform consumers about the Pilot Project; 2) direct mail notification to each customer receiving Default Service to provide information about the price and terms of the program, and the right to choose not to participate (opt-out) which a customer will have at least thirty days to exercise after notice. The general education effort will provide a broad backdrop to the direct mail notification, and provide information concerning the direct mail notification, including a repeat of information contained

in the direct mail piece. The direct mail piece (customer notification) will: a) inform customers that they have the right to opt-out; b) prominently state all charges to be made and offer a comparison of price and primary terms of the competitive supply and Default Service; c) explain how to opt-out and state how to access Default Service; d) provide notice if any charges associated with the opt-out will be made by the supplier; and e) provide information that other competitive supply alternatives may be available at other terms and prices and the telephone number and websites for the Division of Energy Resources and the Department at which information on such alternative supply may be available (as well as a website or similar vehicle, if established, for the Attorney General). In addition, as stated in the Plan, the Compact will require the supplier to establish a toll-free customer service center number that can provide full information on the Compact program and its power supply. Information on this service center number will be included in the general education effort and in the direct mail notification. The Education Plan will be reviewed by the Department's Consumer Division and the Compact will make the Plan available to, and consult with, the Company, DOER and the Office of the Attorney General in advance.

Finally, the Company asks about the type and timing of any termination notice it will receive. The Compact clarifies and confirms that it will provide the Company with as much notice of any termination as practicable. In the event of a planned program termination, this is envisioned to be least ninety (90) days (the same amount of notice that customers will receive). In the event of an involuntary termination such as one due to a material breach by the Compact's supplier, the Compact will notify the Company immediately of the breach and keep it informed of efforts to compel performance by the supplier.

C. Office of the Attorney General

The Attorney General makes three basic points.

First, he suggests that the Department should schedule adjudicatory hearings on the Plan. Neither St. 1997, c. 164, §339 nor G.L. c. 164, §134 specify the procedures that the Department must follow to review a pilot plan. The Compact proposed procedures that are expeditious, consistent with law, and respect the rights of interested persons. In addition, the procedures proposed by the Compact for the Pilot are similar to those utilized by the Department in reviewing the Compact's Aggregation Plan. The procedures required for the Pilot should not be, and need not be, more stringent than those required for the Aggregation Plan.

The Compact confirms that the supply service will be delivered under the terms of the approved Aggregation Plan and, therefore, that the service the Compact is proposing in the Pilot is not a new product; issues reviewed in the process of the Aggregation Plan approval do not require a redundant review. Those issues already have been decided by the Department and adjudicatory proceedings now will result only in excess costs and delay; all of the benefits from a public review of the plan can be easily secured with the procedures suggested by the Compact. Moreover, it should be reiterated that the Compact is not a private party or competitive supplier — it is an intergovernmental association of the twenty-one Cape and Vineyard towns and the two counties, directed by elected officials and others who in turn report frequently to their local boards and who have developed extensive public review and communication procedures. *See, e.g.*, "The Report of the Cape Light Compact in Support of its Aggregation Plan" (May 2000), pp. 6-8.

Consistent with the review procedure for the Aggregation Plan in DTE 00-47 in a non-adjudicatory proceeding and for the same basic reasons as set forth in "Compact Memorandum on Procedures to Review and Approve Aggregation Plan and Power Supply Program" (filed in DTE 00-47, dated May 9, 2000), the Compact therefore requests a similar procedure to complete review of its Plan.

G.L. c. 30A, §§10 and 11 and the Department's regulations grant "parties" certain rights to participate in adjudicatory proceedings before the Department. G.L. c. 30A, §10 specifically provides that, "[i]n conducting adjudicatory proceedings, as defined in this chapter, agencies shall afford all parties an opportunity for full and fair hearing." The Department's regulations, which add detail to the statutory mandate, allow any "person who desires to participate in a proceeding" to file a "petition seeking leave to intervene" as a party, but those regulations limit the definition of "party" to:

> (i) the specifically named persons whose legal rights, duties or privileges are being determined in the adjudicatory proceeding; (ii) any other person who as a matter of constitutional right or by any provision of the Massachusetts General Laws is entitled to participate fully in such proceeding; and (iii) any other person allowed by the Department to intervene as a party.

220 CMR §1.03 (2). See also G.L. c. 30A, §1 (3).

Given the specific provisions of §339 and G.L. c. 164, §134, the more general provisions of G.L. c. 30A, and the Department's intervention regulations, the only party entitled to the full panoply of adjudicatory procedures in connection with review of the Plan (*e.g.*, discovery, filing of direct testimony, right to cross-examination of witnesses, filing of briefs, etc.) is the Compact itself. The Compact is the only "specifically named person whose legal rights, duties or privileges" will be determined in any proceeding that the Department may

conduct to review its Plan. G.L. c. 30A, §1 (3). It is the only party with the statutory right to an adjudicatory decision. To the extent that any customers residing within the Compact's territory object to the Pilot and the Compact's choice of supplier, those customers have the statutorily-guaranteed right to opt-out of the Pilot and, therefore, to avoid any harm they may perceive.

While the Compact thus has the right, *inter alia*, to "call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal testimony" (G.L. c. 30A, § 11), there is no need for this full array of procedures unless the Department improperly grants full party status to other persons and allows them full adjudicatory rights.

The Department should adopt the least-intrusive regulatory tools that allow the Compact to move ahead with its Pilot, consistent with the Department's obligation to review and approve the Plan and with the public's right to meaningful review and comment. The Compact does not have a monopoly franchise and cannot require any customer to accept its Default Service power supply program -- they may simply opt-out and return to the Company's Default Service. There is no reason to employ the same time-consuming and ultimately costly procedures to review the Compact's Plan as the Department has traditionally used to review rate cases and other filings by regulated monopoly providers. As stated in the Compact's Petition, time is of the essence in this matter in order to ensure supplier scheduling of power supply.

Second, the Attorney General raises a number of practical issues about the timing of a contract, recovery of transition costs and the potential impact of the Compact's plan on other Default Service customers. The Compact confirms that no supply contract is in place for the

Pilot and that its market efforts are ongoing; it has previously explained in these Reply Comments the practical barriers to bringing an executed contract or pricing terms before the Department until the Plan, at the very least, gets initial approval.

The Compact determined it would be best to remain flexible in terms of the form of acquiring competitive power supply. The Compact has made direct contract with suppliers, rather than utilizing a broadcast RFP. While the Compact has prepared a RFP which has been successful and served as a model for other parties, it does not believe it is the best tool in the current Massachusetts retail power supply market. The group of suppliers interested in providing retail supply to small commercial and residential customers is limited (as evidenced by the few suppliers indicating interest in serving residential customers on the Department's listing of approved brokers and suppliers). This group is further limited by the fact that few companies are capable of or willing to provide the financial guarantees and operational requirements for supply to a large group of small customers. In its follow-up to direct contact with individual suppliers, the Compact provided aggregate load data for all Default Service customers broken out by calendar month for each class of customers to those suppliers who expressed interest. Suppliers are in the process of analyzing the load data and providing indicative pricing to the Compact. The Compact has also provided a summary of contract terms to these suppliers. For suppliers who provide prices that demonstrate a discount off of anticipated Default Service prices for the twelve months of the year 2002, the Compact will commence contract discussions. The Compact's process is thus targeted to the realities of the Massachusetts market and is consistent with the laws and regulations governing purchase of power supply by municipal aggregators which allow flexibility to utilize, or not to utilize, an

RFP. G.L. c. 30B, §1(b)(33). Given the timing of starting supply coincident with The Company's new Default Service supply contract, this flexibility may prove important.

The Attorney General articulates concerns about the recovery of costs associated with the Plan based perhaps on a misunderstanding that there are no provisions for such cost recovery associated with customer switching or customers leaving the Pilot. As stated in the Plan, the Pilot is based on the Aggregation Plan approved in DTE 00-47. Further, the Company has stated orally that it will not levy any customer charges for administrative costs associated with the Pilot. This includes "switching fees." In terms of "exit fees" for customers who leave the Pilot, the Compact reiterates that there will be no such fees for customers returning to Default Service. It is the intent of the Compact not to require "exit fees" for customers who leave for a competitive supplier. This issue, however, will depend upon market demands and contract negotiation. If such an "exit fee" is required, this issue will be noted when the executed contract is submitted for review by the Department.

The Attorney General also is concerned that the Plan may increase costs to remaining Default Service customers who do not participate or, presumably, opt-out, of the Pilot. The Compact discussed this issue with the Company as part of advance meetings on the draft Plan. In fact, the Company informed its bidders of the Plan as part of its recent RFP process. Suppliers responding to the Company's RFP have factored this risk into their pricing and the Compact has been assured that the pricing and contract with Default Service suppliers protects consumers. Anticipated Company Default Service prices have declined in a similar measure to those of Massachusetts Electric Company, which indicates as an empirical matter that there has been little or no impact as a result of the Plan. In any event, the Compact's Default Service

customers do not make up a significant amount of the Company's Default Service load. In discussions, the Company estimated the Compact Default Service load to be approximately five percent of its total Default Service load. The primary load transition activity anticipated for Company Default Service customers and, therefore, the primary risk in load, is for larger industrial and commercial customers (few of whom are within the Compact's geographical area).

Third, the Attorney General suggests that the Plan may be inconsistent with the Default Service requirements of the Restructuring Act and the Department, citing G.L. c. 164, §1B (d). As stated in the filing, the Compact is seeking to provide competitive supply to Default Service customers as a pilot project. It is not seeking to establish a pilot for Default Service. Therefore, comments regarding the need to specify that it is a Default Service provider are inapt. Nor must the Compact comport with the requirements for the provision of Default Service, since that is not what it is proposing to provide. The Compact agrees with the Attorney General that it is "actually proposing a competitive supply option" and again reiterates that the Plan's policies are based on the Aggregation Plan approved in DTE 00-47. In the very first paragraph of its Plan, the Compact states: "[t]he Compact has planned the Default Service Pilot Project … described herein as a retail program to provide choice and savings for Default Service customers."

The Attorney General also raises concerns that the Compact proposes to notify customers of the switch to its competitive supplier for Default Service during the Thanksgiving holiday season — giving them only a little more than three weeks to opt-out (notification to customers mailed November 14, 2001 with deadline of opting out December 7, 2001). The

schedule for notification is determined by the target to start-up service January 1, 2001, coincident with the start-up of a new Company Default Service supply contract. Further, as stated earlier, customers will be able to return to Default Service without any charge from the supplier. (Of course, unlike Standard Offer, a customer never incurs a charge to return to Default Service since it is the service of last resort and current Default Service customers have no right to receive Standard Offer Service). And, finally, the Compact has since agreed that all customers will be given at least thirty days to opt-out after receiving their initial notice; the timelines will be changed accordingly. This is entirely consistent with the provision for opt-out included in G.L. c. 164, §134 and the Compact's approved Aggregation Plan.

The Attorney General also asks how customers would leave the Pilot to return to the Company's Default Service or take generation service from a competitive supplier. A customer's ability to access a competitive supplier, or return to Default Service, would follow standard "add and drop" protocols established for EDI. Customers will be able to access this information from their competitive supplier, or through the toll-free customer service number of the Compact supplier, via telephone calls to the Compact, or from information posted on the Compact website.

Several parties[1] contend in their initial comments that St. 1997, c. 164, §339 ("§339") does not give the Compact the authority to run an opt-out program for a specific sub-set of its municipal aggregation customers (namely, Default Service customers). They argue that any

[1] The Attorney General and Duke Energy Trading and Marketing, LLC. The Compact understands that the Attorney General is no longer pressing this argument but responds fully given that Duke also advanced it in initial comments.

pilot program under §339 must comply strictly with the statute that it was intended to implement – *i.e.*, G.L. c. 164, §134 and conclude that the Compact's Pilot Plan violates at least two requirements of G.L. c. 164, §134 and, therefore, that it is not authorized.

The Compact believes that the relevant inquiry is whether the Department has the authority to approve the Plan. Pursuant to §339 and G.L. 164, §134, as well as the Department's broad general authority under St. 1997, c. 164 and G.L. c. 164, §§76 and 94, the Compact respectfully submits that the Department has ample authority. The contention that the Plan is not authorized is a red herring; the argument may instead be motivated by a philosophical, policy-based opposition to the opt-out aggregation program that the Compact is designed to implement.

The argument is made that §339 and G.L. c. 164, §134 must be construed so strictly that any pilot established under §339 must be fully consistent with the express terms of G.L. c. 164, §134. As a result, opponents of the Plan conclude that it fails to satisfy this requirement in two respects. First, they assert that the service offered under the Pilot must be universal because G.L. c. 164, §134 provides that "[a]ny municipal load aggregation plan established pursuant to this section shall provide for universal access …." Second, they maintain that the price initially offered under the Pilot Plan must be less than the price of Standard Offer service because G.L. c. 164, §134 requires that "[t]he department shall not approve any such plan if the price for energy would initially exceed the price of the standard offer …."

Regarding the first point, the Compact *will* provide universal access under its Municipal Aggregation Plan, which has already been approved by the Department, as soon as market prices permit service to commence. The Plan is properly viewed as the first stage in

implementing the Aggregation Plan — rather than as a separate aggregation plan.

Second, the assertion that any pilot *must* be tied to Standard Offer pricing because G.L. c. 164, §134 only refers to Standard Offer pricing is wrong. In the first place, when the statutes were enacted, Default Service did not exist in its present, separately priced form. As a result, the statutes could not have specifically referred to Default Service pricing, which the Restructuring Act left to future Departmental action to implement. The references in G.L. c. 164, §134 to Standard Offer pricing were clearly designed to ensure that municipal aggregators did not switch customers to a new supplier without at least affording them one, one hundred eighty day chance to return to Standard Offer service and to protect consumers from being placed on suppliers at a higher cost than Standard Offer. That is most certainly not the case here; the Compact stipulates that it will not utilize any supplier that charges more than the corresponding Default Service price.

Moreover, §339 does not specifically refer to Standard Offer pricing — opponents of the Compact's Pilot simply imply a connection. Section 339 provides in pertinent part that, "[n]otwithstanding any general or special law, rule, or regulation to the contrary, [the Department] and [DOER] shall establish a pilot program to implement the provisions of [G.L. c. 164, § 134]." This language simply means that the Department and DOER are entitled to establish pilots that further the goals of municipal aggregation programs established under G.L. c. 164, §134; had the Legislature meant to limit pilots to ones that met all of the terms of Standard Offer pricing it could have, and would have said so. *See, e.g., TBI, Inc. v . Board of Health of North Andover,* 439 Mass. 9, 18 (2000) ("It is a basic canon of statutory interpretation that 'general statutory language must yield to that which is more specific.'");

Hallett v. Contributory Retirement Appeal Board, 431 Mass. 66, 69 (2000) ("Where 'the Legislature has carefully employed specific language in one paragraph of a statute … but not in others which treat the same topic … the language should not be implied where it is not present.'"); and August 20, 2001 letter from Senator Morrissey and Representative Bosley (legislative intent was to vest broad latitude in the Department to meet changing market conditions in the implementation of restructuring).

Because G.L. c. 164 is an evolving statute (*e.g.*, the introduction of separately-priced Default Service and the myriad of rule-making and other Departmental pronouncements and development of programs to implement retail competition in the Commonwealth), the broad language of §339 must be read as allowing the Department to establish pilots that fit within its framework and further its goals. General canons of statutory interpretation dictate this result.

"[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, the end that the purpose of its framers may be effectuated." *Town of Oxford v. Oxford Water Co.*, 391 Mass. 581, 587-588 (1984), quoting *Hanlon v. Rollins*, 286 Mass. 444, 447 (1934). Statutes must "be interpreted, not alone according to their simple, literal or strict verbal meaning, but in connection with their development, their progression through the legislative body, the history of the times, and prior legislation . . ." *Murphy v. Bohn*, 377 Mass. 544, 548 (1979), quoting *Commonwealth v. Welosky*, 276 Mass. 398, 401-402 (1931).

An unyielding reading of §339 and G.L. c. 164, §134 is inappropriate and undermines the legislative intent of those statutes. The argument against the Department's authority to approve the Plan reduced to its bare essentials is that while the Compact may be authorized to design an Aggregation Plan and execute and implement a contract to bring competitive power supply to all of its approximately one hundred eighty-seven thousand ratepayers, it may not start with those forty-two thousand Default Service customers paying the highest generation rates even though they have no effective choice. This result flies in the face of common-sense and is directly contrary to the policy objectives set out by the General Court in the preamble to the Restructuring Act. St. 1997, c. 164, §1.

Also, "[a] literal construction of statutory language will not be adopted when such a construction will lead to an absurd and unreasonable conclusion and the language to be construed 'is fairly susceptible to a construction that would lead to a logical and sensible result.'" *Lexington v. Bedford*, 378 Mass. 562, 570 (1970) quoting *Bell v. Treasurer of Cambridge*, 310 Mass. 484, 489 (1941). This unduly narrow construction of the statutes would in fact lead to an absurd and unreasonable conclusion — *i.e.*, the consumers currently most in need of the relief afforded under municipal aggregation (Default Service customers) cannot be assisted.

The Compact's reading of the statutes is further supported by the fact that, under the Home Rule Amendment, Mass. Const. Amend. Art. 89, §6, municipalities generally have authority to conduct opt-out aggregation programs for a variety of services. The Home Rule Amendment grants broad home rule power to cities and towns. *See Board of Appeals of Hanover v. Housing Appeals Committee,* 363 Mass. 339, 357-358 (1973). Since its passage,

state courts have consistently held that acts by municipalities are presumed valid unless there is a "sharp conflict" between the local action and some provision of the General Laws — meaning, either the legislative intent to preclude the local action is clear or the purpose of the state statute cannot be achieved in the face of the local action. *See, e.g., Marshfield Family Skateland, Inc. v. Marshfield*, 389 Mass. 436, 440 (1983) and *Grace v. Brookline*, 379 Mass. 43, 54 (1979).

A municipal aggregation pilot program for Default Service customers would not be in sharp conflict with any express provision of §339 or G.L. c. 164, §134. Moreover, the Restructuring Act's aggregation provisions clearly cannot be viewed as being so comprehensive as to leave no room for such local action. *See Boston Teachers Union, Local 66 v. Boston*, 382 Mass. 553, 564 (1981). The fact that the Compact has inherent authority to establish such a program supports the conclusion that §339 should be read broadly enough to permit a pilot accomplishing the same.

D. Duke Energy Trading and Marketing, LLC

Duke makes two basic points. First, it contends, that the Plan is inconsistent with statutory requirements. This point has been responded to at pp. 16-20, *supra*.

Duke's second point is that the Plan does not appropriately consider the impact on Duke, as one of the Company's Default Service suppliers. Duke has a view, apparently, that the Department should protect private, competitive suppliers from impacts on the market that may occur when other suppliers undercut their prices, ignoring the fact that Default Service is intended to be an option of last resort and that the Compact's Aggregation Plan was publicly approved and available more than one year ago, whether or not Duke chose to review it.

Since the summer of 2000, therefore, there has existed the potential for all of the one hundred eighty seven thousand customers in the Compact member towns to migrate to a competitive supplier.

The reality is that Default Service is just that — supply service for those who are not receiving competitive or Standard Offer supply. The Company recently issued an RFP for Default Service supply that included the Compact's Plan, and the market will speak in answer to this question. In terms of anticipated risk, the greatest activity in competitive supply, and therefore the greatest risk for Default Service suppliers, is expected to be from customers in the industrial and commercial classes. As previously noted that the Compact load represents an estimated five percent of the Company's Default Service load, and that the bulk of customers (nearly ninety percent) are residential.

Duke claims that the Department should require the Compact to address the potential adverse impact on existing suppliers. All-requirements supply for Default Service is a fluid supply and will be affected by the exit primarily of industrial and commercial customers, singly and in groups. The impact on the system load profile from the exit of large customers will have a greater impact than that of a group of small customers with a less attractive load profile. Customers already face a potential barrier in having flat rate charges revert to monthly charges when leaving Default Service. The added delay suggested by Duke would present further barriers. The logical conclusion of Duke's position is that all customers should remain on Default Service because the exit of any customers affects the supplier serving all remaining customers. Unless the Commonwealth returns to a regime of tariffed retail electric rates, imposing the burden on governmental aggregators acting solely to provide competitive

opportunities for savings to examine exit impacts is properly a task for the Default Service supplier as part of its due diligence when proposing a price for supply, not a barrier to be placed before customers and the competitive market.

Notwithstanding the foregoing, and in order to assure that there is no "gaming" of the market to the detriment of the Company Default Service supplier, the Compact will include measures in its supply contract that will prevent the Compact supplier from switching customers back to Default Service at the discretion of the supplier for economic reasons. The Compact will also include measures in its supply contract and provide notification to customers that if they switch back to Default Service they may not return to the Compact supply for a term of twelve months.

E. Dominion Retail, Inc.

Dominion's comments seem premised on a philosophical opposition to "opt-out" aggregation and an incendiary characterization of such an approach as "slamming." To the extent Dominion wishes the Department to exceed its authority and overrule the clear legislative recognition of municipal, opt-out aggregators, that invitation must be rejected. Perhaps Dominion truly believes that "opt-in" aggregation is a viable approach, despite overwhelming evidence in other states to the contrary. In any event, its comments provide no basis for the Department to reject or condition an approval of the Compact's Plan.

III. CONCLUSION

For the reasons set forth herein and in its initial filing in this docket, the Compact respectfully submits that the Department should approve its Plan and allow it to implement its Default Service competitive supply Pilot, subject to prior filing of a supply contract and an

expedited review, with comment by interested persons.

If for any reason the Department is unsure about whether it has the authority to approve the Plan, the Compact requests that it sever that issue from the rest of the issues in this docket and decide it first. To the extent the Department wishes briefing on that issue or other questions it may pose, the Compact will do so, but it is simply a waste of scarce Departmental and Compact resources (both of which are entirely funded by public expenditures) to hold extended hearings on other issues raised by the commenters until this threshold issue is determined.

Finally, for the reasons stated above, the Compact strenuously opposes adjudicatory hearings and believes they are legally unwarranted and will serve no purpose other than to delay and add expense to this proceeding, while preventing the Compact from taking advantage of a potential market window to bring economic relief to the forty-two thousand Default Service customers located on the Cape and Vineyard.

Respectfully submitted,

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On the comments: _____

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Dated: October 2, 2001

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